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In the
SUPREME COURT OF THE UNITED STATES

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October Term, 1980

RICHARD H. WHITE,

Petitioner,

v.

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

A. Is the decision of the Court of Appeals, finding that fee awards under 42 U.S.C. §1988 are not costs under Rule 54(d) and that fee awards are a part of the action and not collateral or independent claims, consistent with the decisions of this Court?

B. Is the court's decision urging the parties to negotiate or address the question of fees along with the merits of the action proper?

C. Does the court's decision encourage final settlement of the entire proceeding and is it in the interest of judicial economy?

TABLE OF AUTHORITIES

Cases

Christiansburg Garment Co. v. Equal, Employment Opportunity Commission 434 U.S. 412 (1978) 3, 5

Fase v. Seafarers Welfare and Pension Plan, 589 F. 2d 112 (2d Cir. 1978) . . . 6

King v. Greenblatt, 560 F. 2d 1024, 1026 (1st Cir. 1977) cert. denied, 438 U.S. 916 (1978). 4

Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979) appeal docketed 4th Cir. No. 79-1490 . . . . . 5, 6

Hutto v. Finney, 437 U.S. 678 (1978) 4

Mendoza v. United States, 623 F. 2d 1338 (9th Circ. 1980) 7

Prandini v. National Tea Co., 557 F. 2d 1015 (3d Cir. 1977) 7

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 6

Federal Statutes;

United States Constitution, 14th Amendment . . 1

28 U.S.C. §1920 4

42 U.S.C. §406 6

42 U.S.C. §503(a)(1) 1

42 U.S.C. §1983 3

42 U.S.C. §1988 . . . . . passim

Federal Rules of Civil Procedure:

Rule 54 . . . . . 3, 4, 5

Rule 59 . . . . . passim

TABLE OF CONTENTS*

QUESTIONS FOR REVIEW. i

TABLE OF AUTHORITIES ii

I. STATEMENT OF THE CASE. 1

II. SUMMARY OF ARGUMENT. 3

III. REASONS FOR DENYING THE WRIT. 4

A. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THIS COURT... 4

1. Fee awards under 42 U.S.C.A. 1988 are not "costs" under Rule 54(d). 4

2. Attorney's fees under the Fees Act are a part of the action, not collateral or independent claims. 5

B. THE COURT'S DECISION URGING THE PARTIES TO NEGOTIATE OR ADDRESS THE QUESTION OF FEES IS PROPER. 7

C. THE COURT'S DECISION ENCOURAGES SETTLEMENT OF THE ENTIRE PROCEEDING AND IS IN THE INTEREST OF JUDICIAL ECONOMY. 8

IV. CONCLUSION. 9

APPENDIX. A-1

A. Decision Under Review of the United States Court of Appeals for the First Circuit.

*List of Parties, Citations to Opinions and Judgments and Statement of Jurisdiction omitted Pursuant to Supreme Court Rule 35 .2.

I. STATEMENT OF THE CASE

In the U.S. District Court for the District of New Hampshire the petitioners filed a class action complaint on March 8, 1976 alleging that the New Hampshire Department of Employment Security (hereinafter the Department) failed to make timely determinations concerning the eligibility of certain claimants who filed for unemployment compensation benefits, in violation of the Social Security Act. 42 U.S.C. §503(a)(1). The petitioners also alleged that the Department procedures denied the petitioners due process of law as guaranteed by the 14th Amendment of the United States Constitution. The relief requested was declaratory and injunctive. There was no mention in the complaint of attorney's fees.

On December 16, 1977, after a trial, the District Court entered a final order enjoining the Department to make determinations in less than the time limits established by the Social Security Act. and Regulations. The Department timely appealed to the Court of Appeals.

Before briefs were due in the Court of Appeals, the Petitioners initiated settlement negotiations with the Department. In the course of those negotiations petitioners initially suggested that attorney's fees would be waived, but no written agreement to that effect was signed. Upon the request of the Department the action was remanded to the district court where the Department consented to a decree on the statutory violation. The decree was silent as to attorney's fees. Judgment on that consent decree was entered on January 26, 1979.

Petitioners' attorney filed a motion for attorney's fees pursuant to 42 U.S.C. §1988 (hereinafter Fees Act) on June 7, 1979, almost five months after judgment. The Department objected to that motion, and moved to vacate the consent decree if fees were allowed. The district court overruled the objection to fees and denied the motion to vacate the consent decree.

The Department timely appealed to the Court of Appeals, which reversed the fee award of the District Court, holding that the petitioners' motion for attorney's fees, filed almost five months after entry of judgment, was not filed timely under F.R.C.P. 59(e).

The court ruled that the parties to an action must "face the issue" of attorney's fees in their settlement negotiations. It suggested the parties settle the question, or provide for submission of the entire question of fees to the court at the time of approval of the consent decree. The court held that, failing either of those resolutions, motions for fees under the Fees Act are modification of the judgment, and must be filed within ten days after entry of judgment, as prescribed by F.R.C.P. 59(e).

II. SUMMARY OF ARGUMENT

The First Circuit's decision recognizing that attorney's fees under the Fees Act are not taxable costs as contemplated by F.R.C.P. 54(d) is consistent with this Court's decision in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S., 412 (1978). In Christiansburg this Court denied fees to the prevailing defendant. This is contrary to Rule 54's general language allowing the taxation of costs, as used in that rule, as a matter of course to the prevailing party.

In the case at bar fees were neither requested in the complaint, nor mentioned in the consent decree. Petitioners never requested or moved for costs pursuant to Rule 54, and did not file a request for any fees until almost five months after the consent decree had gone to judgment.

The opinion of the Court of Appeals is correct. Not only does it follow statutory mandates and the decision of this Court, it also recognizes that defendants have a right to expect that an action has ended once it has gone to final judgment. The decision promotes judicial economy as it requires both remedies, i.e., injunctive relief and attorney's fees, allowed under 42 U.S.C. §1983, et seq and other similar statutes to be combined and litigated in one continuous action.

Requiring the parties to face the issue of fees in their negotiations is consistent with the decisions of the Third and Ninth Circuits. The decision does not require the parties to resolve the issue, merely face it. If, for any reason, fees cannot be negotiated, the issue of fees can be reserved for negotiation at a later date or submitted to the court to be resolved at the time of consideration of the consent decree. If none of these things are done then a motion for fees must be filed within the 10 day limit of F.R.C.P. 59(e). The decision serves the interests of the courts and parties as it promotes prompt adjudication of all remedies. The decision should not be disturbed.

III. REASONS FOR DENYING THE WRIT

A. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THIS COURT

Contrary to Petitioner's allegation, the First Circuit's carefully thought out, well-reasoned decision is fully consistent with the decisions of this Court. Respondent has discovered no opinions issued by this Court that directly conflict with the First Circuit's decision in this case.

Cited frequently by petitioner is the case of Hutto v. Finney, 437 U.S. 678 (1978). Hutto merely stands for the proposition that attorney's fees under the Fees Act can be awarded against the State under the Fourteenth Amendment. Dicta in the decision does speak of attorney's fees being "costs". However, whether or not attorney's fees under the Fees Act are costs to be taxed under F.R.C.P. 54(d) was not addressed.

1. Fee awards under 42 U.S.C. §1988 are not "costs" under Rule 54(d)

The court properly rejected the theorty that attorney's fees are taxable costs under 54(d). It recognized that attorney's fees are substantially different than the usual costs taxed by the clerk of the court. Attorney's fees are not easily calculated by the court nor are they a known quantity. As stated by the court, the costs allowed

> "...by 54(d) and detailed in 28 U.S.C. §1920 are items of a nature very different from the discretionary attorney's fees allowed under the Fees Act. Rule 54(d) envisages the former as capable of being taxed by the clerk on one day's notice..." A.10

Other factors show that attorney's fees are not "costs". The court itself must rule on a request for fees under the Fees Act but the clerk has the power to tax costs. The court must evaluate possibly a dozen diverse factors including such items as the novelty and difficulty of the legal question presented and the skill required to present the case. See King v. Greenblatt, 560 F.2d 1024, 1026 (1st Cir. 1977), cert. den. 438 U.S. 916 (1978). The taxing of costs does not usually engender controversy in lititgation among the parties. Costs are usually taxed as a matter of course by the clerk. In contrast, more often than not, it is necessary for the court to hold a hearing and receive evidence on the question of an attorney's fees award.

The substantial differences between taxable costs and attorney's fees awards is best exemplified by this Court's decision in Christiansburg Garment Co. v. Equal Employment Opportunity Commission 434 U.S. 413 (1978). This Court in Christiansburg refused to award attorney's fees to the prevailing defendant. This court ruled that those defending civil rights actions will not be awarded attorney's fees absent bad faith and/or harassment by the plaintiffs allegedly seeking to enforce a federal right. Rule 54, on the other hand, contemplates awarding costs covered by that rule to prevailing parties as a matter of course, absent any statutory bar to such an award. There is no statutory bar present in the language of the Fees Act, it merely states that award should made to the prevailing party. Classifying fees as costs within the meaning of Rule 54 is contrary to this Court's decision in Christiansburg. Attorney's fees cannot and should not be equated with taxable costs.

2. Attorney's fees under the Fees Act are a part of the action, not collateral or independent claims.

Applications for attorney's fees are part of a plaintiff's claims in the action, not collateral and independent. The First Circuit correctly recognized that the statute provided that:

> " 'in any action or proceeding to enforce [appropriate civil rights statutes] the court may in its discretion allow reasonable attorney's fees to the prevailing party (emphasis added).' This language strongly indicates that the fee issue is one properly viewed as properly belonging in the main body of the already commenced civil rights action." A.13

Thus, a claim for fees is an integral part of the action. The request for fees was a request to modify that final judgment and cannot survive the 10 day jurisdictional limit of Rule 59(e). When judgment was entered it was the final order terminating the litigation.

There are claims for attorney's fees that are not affected by final judgment. Two such special circumstances are described by Judge Warriner in Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979) appeal docketed (4th Cir. No. 79-1490). The first is

a collateral or independent claim, that arises when attorneys or parties seek their fees under the "Common Fund Theory" from a pool of assets created by the litigation. Id. at 63, See A, 12, Fase v. Seafarers Welfare & Pension Plan, 589 F.2d 112, 114-15 n.3 (2d Cir. 1978). This Court's decision in Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), allowing fees outside the jurisdictional limit (under the old Federal Rules), did so under the "Common Fund Theory". In Sprague, plaintiff prevailed. As a result of her success others were benefited by the doctrine of stare decisis. A fund of earmarked bonds was created by the action. This Court allowed fees finding that the action for fees was an action for assets created by the first decision and was "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree...". Id. at 170. This present action created no fund nor were any money damages ever requested until petitioners filed their motion for fees.

The second circumstance noted in Hirschkop, supra at 64 is where the attorney seeks to enforce a right of the attorney, not a right of the client. An example of such an award would be a request for attorney's fees under the Social Security Act 42 U.S.C. §406, and regulations thereunder, awarding fees directly to the attorney. The language of the Fees Act is clear; the award goes to the prevailing party. The attorney has no independent right.

The defendants in this case had a right to believe the action had ended once the consent decree went to judgment. Plaintiff's complaint did not request fees. None of the court's orders awarded fees. The consent decree did not mention fees, and no motion for "costs" was ever filed by petitioners in any court.

Attorney's fees under the Fees Act are part of the main body of the civil rights action. A.13 They are not independent or collateral claims and cannot survive entry of final judgment.

B. THE COURT'S DECISION URGING THE PARTIES TO NEGOTIATE OR ADDRESS THE QUESTION OF FEES IS PROPER.

The decision below requires the parties to "face up" to the issue of attorney's fees in their settlement negotiations. A. 15 If the parties do not face the issue, then the prevailing party must move for attorney's fees within ten days after judgment. The parties may face the issue by agreeing on the fee, if any, submitting the question to the court contemporaneous with the submission of the consent decree, or agreeing to partial judgment on the decree and reserving the questions of fees. This last alternative allows the court to retain jurisidiction on the question of fees while entering final judgment on the remainder of the action.

The parties and the courts have much to gain by settling all of an action at one time. Attorney's fees must be faced at some time. It is impossible to ignore attorney's fees in settlement negotiations on the merits of an action. Attorney's fees can be substantial, often over hundreds of thousands of dollars. A.13

The possibility of an award of attorney's fees in cases similar to this action may be the main criterion in a defendant's decision whether or not to continue to litigate. Often, civil rights actions are brought to force a change of policy in governmental programs. State defendants, in particular, while vehemently denying that they are constitutionally mandated to make such a change, often are quite willing to adopt or try a new program method because they believe it a wise or humane concept. State defendants are often willing even to consent to a decree ordering such a policy change. However, such defendants are unwilling to, and state treasuries will not allow, consent to decrees in cases where the state defendants might prevail on the merits unless attorney's fees are addressed in the settlement.

The defendant, negotiating settlement in good faith, having no objection to implementing the relief sought, has a right to know what the settlement is going to cost before agreeing to settle. The

decision of the Court of Appeals permits such knowledge yet also provides a safety valve where, for whatever reason, the parties are not able to agree on fees at the same time that they agree on the remainder of the relief sought. By providing a safty valve, the First Circuit effectively resolved the conflict between its decision and the decision of the Third and Ninth Circuits questioning the propriety of negotiating the merits of an action simultaneously with the question of attorney's fees. See Prandini v. National Tea Co. 557, F.2d 1015 (CA 3 1977) and Mendoza v. United States 623 F.2d 1338 (CA 9 1980). The decision is sound, and should not be disturbed.

C. THE COURT'S DECISION ENCOURAGES SETTLEMENT OF THE ENTIRE PROCEEDING AND IS IN THE INTEREST OF JUDICIAL ECONOMY

The Court of Appeals for the First Circuit is in an excellent position to judge the adverse effects of allowing plaintiffs to pursue one statutory cause of action, albeit a cause having two remedies, separately through the courts. The decision below will force all parties in civil rights actions to address themselves to all remedies, thus encouraging total settlement of the action. The decision below will conserve scarce judicial resources.

Requiring parties and the district courts to address the issues of fees will not affect the court'a ability to give prompt and effective relief in civil rights cases. The decision allows the district courts ample flexibility to deal with all issues promptly and justly. For example, the district court, in a proper case, can enter judgment on a part of a case and reserve judgment on the remainder. A. 14, 15

The court's decision promotes judicial economy, and does not prejudice any rights of any parties.

IV. CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Dated: February 17, 1981

Respectfully submitted,

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, et al

By their Attorneys:

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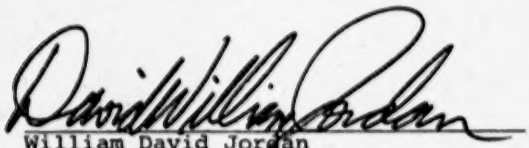

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United States Court of Appeals
For the First Circuit

No. 79-1536

RICHARD H. WHITE,

PLAINTIFF, APPELLEE,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. MARTIN F. LOUGHLIN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Michael M. Black, with whom *Edward F. Smith* was on brief, for appellant.

Raymond J. Kelly, with whom *Alan Cronheim* was on brief, for appellees.

August 12, 1980

CAMPBELL, *Circuit Judge*. New Hampshire Department of Employment Security (NHDES) appeals from the district court's allowance of plaintiff's post-judgment request for attorney's fees and the court's denial of NHDES' subsequent motion to vacate a previously entered consent decree. As we find the fees request to have been filed too late, we reverse the award.

On March 8, 1976 the plaintiff, Richard M. White, commenced a class action in the United States District Court for the District of New Hampshire challenging NHDES' unemployment compensation procedures. White alleged that delays in the administration of New Hampshire's unemployment compensation program affecting certain groups of

applicants worked a denial of due process and as well were violative of the so-called "when due" clause of the Social Security Act, 42 U.S.C. § 503(a)(1).[1] The complaint alleged jurisdiction under 28 U.S.C. §§ 1343(3), (4) and 42 U.S.C. § 1983; requested class certification under Fed. R. Civ. P. 23; and sought declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202 and Fed. R. Civ. P. 57. The complaint did not include any request for attorney's fees.

Class certification was obtained on May 11, 1976, with the case proceeding to trial on October 12, 1977. The district court found that NHDES' scheme of administration did indeed violate the "when due" provision of the Social Security Act; the court ordered relief and judgment was entered November 15, 1977. Neither the court's opinion and order nor the judgment made any reference to a possible award of attorney's fees. The judgment was subsequently amended in respects not pertinent to the present appeal, and NHDES, on December 27, 1977, filed a timely notice of appeal.

While its appeal was pending in this court, NHDES requested and received numerous extensions of time for the filing of briefs and designation of an appendix on the ground that the parties were attempting to negotiate a settlement. Finally, on December 11, 1978, upon motion of NHDES, this court ordered the "cause...remanded to the district court for the purpose of entertaining a consent decree." The consent decree was approved by the district court on January 26, 1979, with judgment entered on that day. Neither the consent decree nor the judgment contained mention of attorney's fees. The district court returned, after request, the appeal bond on February 28, 1979; the various exhibits apparently also were returned on or near that date.

[1] The complaint also raised a pendent state claim alleging violations of R.S.A. 282:5-B(2)(d) which regulates certain aspects of New Hampshire unemployment compensation eligibility determination procedures.

On June 7, 1979, some four and one-half months after the district court's approval of the consent decree and its entry of judgment, plaintiffs moved for an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. NHDES objected to this motion contending: 1) that plaintiffs had, during the "original discussions...concerning settlement," indicated that attorney's fees would be waived;[2] 2) that plaintiffs had waited "too long to request attorney's fees...;" 3) that an award of fees would be counterproductive as it would penalize the state despite its good faith settlement efforts; and 4) that plaintiffs were not, under the terms of the consent decree, truly the "prevailing party."

A hearing on the fee request was held, and on August 30, 1979 the district court entered an order granting a fee award in an amount in excess of $16,000. Shortly thereafter, on September 13, 1979, NHDES, over ojection, moved to vacate the consent decree contending that "Plaintiff's Motion for Attorney's Fees which was filed almost six months after the entry of the Consent Decree caught [NHDES] by surprise, as prior to this time, [NHDES] had no notice that attorney's fees would be requested and certainly had no notice at all as to the amount of attorney's fees that would be requested." The district court, after hearing, in a terse order of October 1, 1979, denied the motion to vacate. NHDES had previously filed on September 28, 1979 a notice of appeal of the district court's award of fees, and on October 30, 1979 it filed a similar

[2] In the fees hearing before the district court, the parties presented different versions of talks they had had concerning attorney's fees prior to their approval of the consent decree which, as already mentioned, was silent on the subject. Plaintiffs contended that they had expected the fees issue to be resolved through negotiation following the entry of judgment while NHDES basically represented that it had expected that the issue of fees would not be pursued. The district court in its opinion awarding fees concluded that attempts to resolve the fees matter at the time of entry of the consent decree "proved nugatory."

notice concerning the court's adverse ruling on its motion to vacate. The appeals were consolidated by this court's order of November 6, 1979.

I.

We dispose of this appeal focusing solely on the question of the timeliness of plaintiff's motion for fees. As we set aside the award because the request was untimely, we do not consider NHDES' alternative contention that, in light of the unexpected award, it should be allowed to withdraw its consent and that the judgment entered pursuant to such consent should therefore be vacated. We hold that a fees award under 42 U.S.C. § 1988 is a matter to be raised and determined prior to entry of final judgment, and that, at the latest, a fees request may be presented after judgment only within such time limits as apply to an appropriate motion to reopen the judgment. Here the proper post-judgment motion was one to alter or amend judgment under Fed. R. Civ. P. 59(e); such a motion must, however, be served within 10 days after entry of judgment.[3] Since the present fees request was filed long after expiration of the 10 day period, and since Fed. R. Civ. P. 6(b) prohibits a court from extending the 10 day period, the lower court was without authority to entertain plaintiff's fees request.

Before proceeding to amplify these views we briefly consider plaintiff's threshold argument that since NHDES did not specifically raise the Rule 59(e) argument in the lower court, it is precluded from doing so now. *See Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979). The short answer to this objection is that Rule 6(b)'s proscription against the enlargement of the time for serving motions under Rule 59(e) is "mandatory and jurisdictional." *Lapiczak* v. *Zaist*, 451 F.2d

[3]Rule 59(e) provides in its entirety

"Motion to Alter or Amend a Judgment. A Motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

79, 80 (2d Cir. 1971); *see United States* v. *Robinson*, 361 U.S. 220, 229 (1960). Since we hold that a section 1988 fees motion must be made in time to be incorporated in the final judgment, the 10 day period prescribed by Rule 59(e) was in these circumstances the movant's last shot at achieving this result. The district court was thus without jurisdiction over the later application, and the matter of that lack of jurisdiction properly may be first raised at any stage of the proceedings, including the present appeal. *See, e.g.*, Fed. R. Civ. P. 12(b)(3).

II.

Coming to the merits of the timeliness question, our view of the procedural rules applicable to a section 1988 fees request is essentially that set out by Judge Warriner of the Eastern District of Virginia in a comprehensive opinion in *Hirschkop* v. *Snead*, 475 F. Supp. 59 (E.D. Va. 1979). Judge Warriner concluded that "the weight of authority favors the proposition that a motion for attorney's fees under § 1988 must be made within 10 days of entry of final judgment under Rule 59(e)." 475 F. Supp. at 62. The court, in the course of concluding that a final judgment had in fact been entered, rejected the argument that section 1988 fees should be treated as an item of costs governed by Fed. R. Civ. P. 54 and 58, which permit the taxing of costs, without express limit of time, after entry of judgment. The court also rejected the alternative argument that section 1988 fees were somehow so "collateral" to the main litigation as to be eligible for treatment in isolation from the judgment therein.

When the present fees award was appealed, no circuit court had yet spoken on the timeliness issue considered in *Hirschkop*, although there existed a fair amount of circuit and district court authority on the timeliness of motions for attorney's fees made in contexts other than section 1988.[4] Most, though not

[4] *E.g.*, *Fase* v. *Seafarers Welfare & Pension Plan*, 79 F.R.D. 363 (E.D.N.Y. 1978) (in action for disability pension benefits, Fed. R. Civ. P. 59(e)'s ten-day time limitation bars successful plaintiff's request for attorney's fees filed more than 30 days after the entry of

all, of this authority pointed in the direction taken by the district court in *Hirschkop*. The first decision by a circuit court discussing the timeliness of a section 1988 fee request was handed down soon after appellate argument in the present case; this was the Fifth Circuit's decision in *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980), holding, contrary to *Hirschkop*, that attorney's fees under section 1988 were "costs" within Fed. R. Civ. P. 54(b) and 58. As Rule 58 specifically provides that "Entry of judgment shall not be delayed for the taxing of costs," and neither Rule 54(b) nor 58 purports to prescribe any period after judgment within which costs ap-

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judgment) (aff'd on other grounds, although timeliness issue discussed without resolution, 589 F.2d 112 (2d Cir. 1978); *Stacy* v. *Williams*, 50 F.R.D. 52 (N.D. Miss. 1970) (Rule 59(e)'s ten-day limitation bars request for attorney's fees filed more than two months after entry of final judgment; court concluded that it was bound to apply Rule 59 as the fee request concerned "the granting of new substantive relief") (aff'd on the basis of Rule 59(e), 446 F.2d 1366 (5th Cir. 1971)); *DuBuit* v. *Harwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976) (in patent case, "issue of attorney's fees should have been considered and disposed of either prior to or at the time of the entry of final judgment...and not left open pending the outcome of the appeal."); *Hill* v. *TVA*, 84 F.R.D. 226 (E.D. Tenn. 1979) (in action under Endangered Species Act, request for attorney's fees filed some 28 months after the entry of court's "final order" was barred by Rule 59(e)'s ten-day limitation or alternatively by Rule 60(b)'s one-year limitation on motions for relief from judgment); *Laufenberg, Inc.* v. *Goldblatt Bros.*, 187 F.2d 823 (7th Cir. 1951) (interpreting statute governing award of attorney's fees in patent infringement case to mean "that if an award...is to be made...the [trial] judge should do so either at the time of the entry of judgment or specifically reserve jurisdiction in such judgment to do so. ..."). *Compare Lichtenstein* v. *Lichtenstein*, 55 F.R.D. 535 (E.D. Pa. 1972) (although acknowledging that Rule 59(e) would bar a motion to amend the judgment to include attorney's fees filed after the Rule's ten-day period had expired, the court instead termed plaintiff's request as one to amend the Bill of Costs and allowed it despite timeliness objection) (rev'd on other grounds, 481 F.2d 682 (3d Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974)). *See also* the so-called common fund cases discussed *infra*.

plications must be filed, the Fifth Circuit, in the absence of any contrary local rule,[5] found no bar to entertaining a fees request filed some two months after the entry of final judgment. Were we to follow the decision in *Knighton*, the present fees request and award would thus likely be timely even though filed some months after entry of final judgment. With all respect, however, we disagree with *Knighton*.

We start from the premise that a final judgment ordinarily signifies the final resolution, subject to appeal, of all claims raised in a lawsuit. *See* Fed. R. Civ. P. 54. New claims may thereafter be advanced and old ones reinstated only pursuant to rules providing, within narrowly defined circumstances, for the reopening of the judgment. *See, e.g.*, Fed. R. Civ. P. 59, 60. If this were not so, appellate tribunals would be constantly vexed by multiple appeals growing out of fragments of the same litigation, and a party could never be sure when his case had ended.[6] It follows that a prevailing party's claim for at-

[5] Although there is no local rule in the District of New Hampshire providing that motions for costs be filed within some specified time after entry of judgment, a number of district courts have adopted such rules. 10 Wright & Miller, Federal Practice and Procedure § 2679 at 240 n.76.

[6] Blackstone adds a bit of historical perspective to the practical considerations underlying the well-settled concept of finality of judgments. He tells how Edward I, "on his return from his French dominions in the seventeenth year of his reign" found it "necessary (or convenient, in order to replenish his exchequer)" to fine rather heavily various judges for "their corruption and other malpractices...." Paramount among these bad habits was the practice of "erasing and altering records," a practice apparently engaged in by "almost all of the king's justices, even the most able and upright." And these punishments were often of a sizeable amount. Sir Ralph Hengham, Chief Justice of the King's Bench is said to have been fined some 7,000 marks, a rather tidy sum considering that the Chief's annual salary was then only 60 marks. The threat of such punishment was clearly not lost on the bench, for as Blackstone relates: "The severity of which proceedings seems to have alarmed the succeeding judges, that through a fear of being said to do wrong,

torney's fees under section 1988 must be resolved before or in the final judgment unless that claim be regarded as falling within some special exception carved out by rule or practice.

Plaintiff urges two such exceptions upon us in support of the view that their failure to request fees prior to the entry of judgment or to move within 10 days to amend such judgment so as to include a fee award, is not fatal to their subsequent fee application. First plaintiff argues, as the Fifth Circuit held in *Knighton*, that section 1988 fees are properly treated as "costs," and thus specifically exempted from the requirement of resolution prior to the entry of final judgment.[7] This position is not without some support in the language of the Fees Act. The Act grants to the district court, in various specified actions, the discretion to "allow the prevailing party, other

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they hesitated at doing what was right. As it was hazardous to alter a record duly made up, even from compassionate motives...they resolved not to touch a record any more; but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called in question: and, because Britton had forbidden all criminal and clandestine alterations, to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. ..." 3 Blackstone Commentaries, 409-410.

Thus from Edward's rather severe attempt to fill his coffers and the already traditional view of the solemnity of all judgments "came the ancient common law rule that a judgment, once enrolled on parchment, was unalterable even for the correction of a manifest mistake." *La Vale Plaza, Inc.* v. *R. S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967). Today, rules such as Fed. R. Civ. P. 54, 59 and 60 ease the situation somewhat, but the difficulties that would ensue were individual cases not to be organized around the principle of single and final judgment keep such escape valves the exception, not the rule.

[7]Notwithstanding plaintiff's reliance on the concept that attorney's fees are taxable as Rule 54 costs, plaintiff's motion for an award of attorney's fees was not made as part of a general application for costs; apparently, in fact, no such request for costs has yet been filed by plaintiff.

than the United States, a reasonable attorney's fee *as part of the costs.*" 42 U.S.C. § 1988 (emphasis added). Focusing upon this language, the Fifth Circuit concluded in *Knighton* that, "Because Congress directed that attorney's fees under section 1988 be treated as costs, there is no jurisdictional time limit on the filing of a motion seeking such fees." *Knighton* v. *Watkins*, 616 F.2d 795, 798 (5th Cir. 1980) (footnote omitted). We are unpersuaded, however, by this analysis.[8]

We do not find it clear that Congress, by generally describing attorney's fees under section 1988 as a part of the costs, meant thereby to include those fees within the specific type of costs recoverable after judgment under Fed. R. Civ. P. 54. Rule 54(d), referring to the awarding of costs, provides, in part, that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs... Costs may be taxed by the clerk on one day's notice." 28 U.S.C. § 1920 adds a bit of flesh to the bones of Rule 54(d) by providing:

> "A judge or clerk of any court of the United States may tax as costs the following:

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[8]Apart from the argument based on "costs," *see, infra*, the Fifth Circuit in *Knighton* pointed to little in support of its conclusion that motions for section 1988 fees may be filed after judgment has been entered and the 10 day period for amending or altering such judgment has expired. *See* Fed. R. Civ. P. 59(e). To say, as did that court, that a motion for fees does not change the judgment but merely seeks what is due because of the judgmmnt is to beg the question to be decided. Nor are the cases cited by the Fifth Circuit in *Knighton* compelling. *National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991, 994-95 n.3 (D.D.C. 1974), discussed the timeliness of a request for fees in the context of the so-called common fund situation, a situation which has long been distinguished from cases like the present. *See infra*. And, *Environmental Defense Fund, Inc.* v. *Froehlke*, 368 F. Supp. 231, 251-55 (W.D. Mo. 1973), while providing thorough background information on the history of and procedure for the awarding of costs, did not discuss the question of attorney's fees generally, let alone the specific question of the timeliness of a request for such.

(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Examination of the above language strongly indicates that the costs allowed as of course by Rule 54(d) and detailed in 28 U.S.C. § 1920 are items of a nature very different from the discretionary attorney's fees allowed under the Fees Act. Rule 54(d) envisages the former as capable of being taxed by the clerk on one day's notice. In keeping with this idea the costs listed in section 1920 are almost all capable of routine computation, and the one arguable exception, item (6), is peculiarly within the court's own authority to establish, without input from the parties and with little likelihood of engendering controversy. Not so the discretionary award of attorney's fees under section 1988. To calculate such an award, indeed, even to determine whether one should be made at all, the district court must evaluate possibly a dozen diverse factors, *see King* v. *Greenblatt*, 560 F.2d 1024, 1026 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), including such factors as the novelty and difficulty of the legal questions presented and the skill required to perform the particular services provided. Moreover, in determining the propriety and size of a fee award, the district court is generally assisted by submissions

from the parties and frequently finds it necessary, as was true here, to hold a hearing on the matter. Appeals often ensue—leading to the prospect of separate fees appeals if final judgment rules are disregarded—as the sizeable sums involved may impose a very substantial and bitterly disputed liability upon the losing party. Hence while such fees, like routine costs, are, to be sure, somewhat ancillary to the main dispute, they are fully capable of engendering a major controverted claim which will be closely intertwined with the merits of the primary dispute and which will require careful factual and legal analysis by the court. The considerations making it feasible to treat routine costs as an exception to final judgment rules—the ease of their computation and the fact that they almost never give rise to dispute or appeal—plainly do not apply to section 1988 attorney's fees. Thus we do not believe that a section 1988 fees award can be likened to the costs assessed routinely after entry of judgment. The potential amount of the fees award, the varied factors which must be considered by the court in reaching the fees decision, and the crucial role of the judge and parties in reaching that final determination render the fees/costs comparison strained at best.

True, as plaintiff points out, the Supreme Court itself, in *Hutto* v. *Finney*, 437 U.S. 678 (1978), citing the language of the Fees Act, characterized attorney's fees under section 1988 as being a part of "costs." But this statement was made in the context of rejecting the contention that the eleventh amendment stood as a bar to the awarding of fees against a state. The Court's general reasoning and ultimate conclusion that "Costs have traditionally been awarded without regard for the state's Eleventh Amendment immunity," *id.* at 695, hardly seems dispositive of the question whether section 1988 attorney's fees fall within the specific types of taxable costs contemplated by Fed. R. Civ. P. 54(d) and 58. *Cf. Roadway Express, Inc.* v. *Piper*, 48 U.S.L.W. 4836 (June 23, 1980) (costs that federal courts may impose on lawyers who unreasonably and vexatiously extend court proceedings do not include attorneys' fees under section 1988).

Plaintiff advances a second and alternative argument in support of his position that the resolution of a section 1988 fee request should be treated differently from the general run of controverted issues resolved within the contours of a court's final judgment. He suggests that his "claim for attorney's fees is a collateral and independent claim," and thus not controlled by the time limits which relate solely to the entry of judgment in the central but supposedly separate claim on the merits. Plaintiff would have us view the fee matter as a separate mini-lawsuit to be commenced, argued and resolved at some point in time following the entry of judgment in the central litigation. While plaintiff argues that this position finds support in the cases, the cited decisions involved circumstances of a different sort than those presented here. As discussed by Judge Friendly in *Fase* v. *Seafarers Welfare & Pension Plan*, 589 F.2d 112, 114-15 n.3 (2d Cir. 1978), "cases where attorneys seek, long after judgment, to be paid out of a fund created by the judgment, *Trustees* v. *Greenough*, 105 U.S. 527 (1882), *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885), or earmarked assets whose distribution would be governed by the legal principle which plaintiff's attorney had established, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939)...present a lesser problem than those where allowance of a fee will result in an addition to the amount awarded by judgment. Something may also turn on whether...the lawyer is asserting a right of his own...; in the latter type of case it is easier to characterize the proceeding as 'collateral' or 'independent.' " Here we have neither the so-called common fund situation, *see also National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991 (D.D.C. 1974), *rev'd on other grounds*, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977), nor an attorney seeking fees by asserting a right of his own rather than one of his client. *See* 42 U.S.C. § 1988 (award of attorney's fees goes to "prevailing party," rather than attorney). *But cf. Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980).

Moreover, plaintiff's contention that a section 1988 fee request is an independent claim that can be maintained after judgment runs squarely counter to the language of the Fees Act itself, which provides that "*In any action or proceeding* to enforce [appropriate civil rights statutes]" the court may, in its discretion, allow reasonable attorney's fees to the prevailing party. (Emphasis added). This language strongly indicates that the fee issue is one properly viewed as belonging within the main body of the already commenced civil rights action.

We thus remain unpersuaded that a section 1988 fees request falls within some recognized exception—be it "costs" or a theory of independent claim—to the general rule requiring the resolution of controverted issues by a trial judge within the overall framework of the central litigation and the final judgment entered therein. Rather, our review of the relevant authority, *see, e.g.*, note 4, *supra*, including the Fees Act and the well-reasoned *Hirschkop* decision previously discussed, persuades us that the timeliness of a post-judgment motion for attorney's fees made pursuant to section 1988 is properly governed by Rule 59(e)'s ten day limitation.[9] A request for a discretionary award of fees under section 1988 is intimately tied to the questions raised in, and overall merits of, the prevailing party's case, *see King* v. *Greenblatt*, 560 F.2d at 1026-27; it is a request, moreover, that may lead to a sizeable and unpredictable addition to the burdens shouldered by the losing party, *see, e.g.*, *Palmigiano* v. *Garrahy*, 616 F.2d 598 (1st Cir. 1980) (affirming fee award of $115,483.75); *Lamphere* v. *Brown University*, 610 F.2d 46 (1st Cir. 1979) (award well in excess of $200,000). The ultimate award of fees is, in our view, clearly a part of the overall relief sought and granted during the course of a particular civil rights action. Not only will it often be more economical of a court's time to resolve fees requests prior to

[9] We need not now address the question whether and in what circumstances the time limits established in other Rules permitting the opening of judgments might apply to a section 1988 fees request.

entry of judgment rather than having them surface for the first time weeks or even months thereafter, but so doing ensures certainty as to the scope and finality of the judgment, *see Fase* v. *Seafarers Welfare & Pension Plan*, 79 F.R.D. 363, 367 (E.D.N.Y. 1978), and at the same time reflects and re-enforces the strong policy against piecemeal appeals. *Wright* v. *Jackson*, 522 F.2d 955, 957 (4th Cir. 1975) (Aldrich, J.).

Indeed, the present case highlights many of the problems which would likely be frequently encountered were we not to endorse the position that Rule 59(e)'s ten day limitation marks, in terms of time, the outer limits of a fees request. The protraction here of a dispute previously, to all appearances, resolved is clearly not an occurrence to be encouraged. A court, having set its hand to the plow on the central litigation, should complete the furrow all at one time. The present post-judgment motion for an award, coming as it did nearly five months after judgment, was in our view too late.

We add that we see our decision as imposing no great hardship on civil rights litigants or courts. Doubtless persons such as the present litigants who have acted prior to this decision have greater cause for complaint than will those who follow them, but most fees litigants who have previously come to our attention have taken pains to request fees prior to or within ten days following entry of judgment, *see, e.g., Ben David* v. *Travisono*, No. 79-1186, slip op. at 6 n.2 (1st Cir. May 16, 1980); the state of the law has surely been such as to suggest the wisdom of that course.

Our decision will not prevent a district court from granting prompt and effective relief in a civil rights case. Entry of judgment which determines all matters except fees and includes an express reservation of the issue of fees, is a possible option when time is of the essence. Such a judgment might raise a question of finality should an appeal immediately be taken, *see Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980), but even if non-appealable because still interlocutory the judgment would otherwise be effective. And the district court has the

means to ensure, when necessary, the appealability of such a judgment. Under Fed. R. Civ. P. 54(b) the court may direct the entry of final judgment forthwith upon fewer than all claims presented upon determining expressly that there is no just reason for delay. Thus under our present decision the district court retains ample flexibilty. Our decision merely ensures that fees, like all other matters in controversy, will be covered by a unified judgment which, absent express action under Rule 54(b), controls the entire case.

Nor in a consent decree context do we see anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations. *Cf. Regalado* v. *Johnson*, 79 F.R.D. 447 (N.D. Ill. 1978) (expressing concern over the propriety of injecting the issue of fees into settlement negotiations). Failure to confront the fees issue merely muddies the waters, as the present case well demonstrates. We of course do not suggest that an attorney in the course of settlement negotiations need, or in every case properly may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree. If agreement as to fees is not easily accomplished, the parties may provide for submission of the entire question of fees to the court; further, they may, of course, decide to waive fees altogether. But there is nothing whatever to be encouraged in the path followed here—leaving the matter of fees unmentioned in the settlement and then raising it unilaterally several months later under circumstances that cast a shadow upon the settlement itself. Where Congress has spoken on the subject of fees, there can be no virtue in pretending the issue does not exist.

As plaintiff's fees claim was filed out of time, it should not have been entertained, and we hold the district court was without jurisdiction to make any award.

The fees award entered by the district court is vacated.

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